

*Calif.*, 13 F.C.C.2d 448, 460 (1968) (cable television transmission does not meet definition because it “does not require an exchange [and] does not go through an exchange”).<sup>9/</sup> DSL transmissions are taken off the PSTN at the first feasible point before arriving at any circuit switch or other vehicle of universal connectivity, so that the only facility that they share with PSTN traffic is the copper loop connecting the end user’s premises to the closest central office. See *Advanced Services Order*, 13 FCC Rcd at 24027 (¶ 30) (“Thus, the data traffic, after traversing the local loop, avoids the circuit-switched telephone network altogether.”). Under FCC precedent, this minimal level of sharing is not enough to make DSL a telephone exchange service,<sup>10/</sup> and the FCC did not suggest otherwise in the *Advanced Services Order*.

Even if only the initial leg of a DSL communication is considered — that is, the high-speed link between the end user and the predesignated ISP — that link bears no resemblance to the any-to-any local “intercommunicating service” encompassed by the statutory definition. 47 U.S.C. § 153(47)(A). According to the FCC, telephone exchange service involves “a central switching complex which interconnects all subscribers within a geographic area.” *BellSouth Order*, 13 FCC Rcd at 20621. And telephone exchange service is “a local calling capability that permits a community of interconnected customers to make calls to one another

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<sup>9/</sup> See also *North Carolina Utils. Comm’n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977) (“The term ‘telephone exchange service’ is a statutory term of art, and means service within a discrete local exchange system.”). Cf. *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1093 n.8 (7th Cir. 1983) (describing the network configuration of “local exchange telephone service”).

<sup>10/</sup> See *American Tel. & Tel.*, 38 FCC 1127, 1134 (1965) (“[T]he fact that TWX [teletypewriter exchange] service, in some aspects, makes use of exchange facilities in common with telephone exchange service does not convert TWX service into telephone exchange service.”).

over [such] a switched network.” *Offshore Tel. Co.*, 3 FCC Rcd 4137, 4142 (1988).<sup>11/</sup> Services that connect only predesignated locations or do not permit ubiquitous local intercommunication do not, according to the FCC, constitute telephone exchange service.<sup>12/</sup>

DSL does not permit any-to-any intercommunication within a local exchange. When an end user signs up for DSL, the user must also specify the Internet service provider (or other party) with whom the user wants to establish its high-speed connection. Once the DSL provider establishes a permanent virtual connection between the two, the end user has an always-on, *dedicated* “pipe” connected exclusively to the other party.<sup>13/</sup> If the other party is an Internet service provider, it can, in turn, route traffic from the end user’s pipe over the Internet. But this routing is done by the Internet service provider, not the DSL provider; the end user’s DSL pipe always remains pointed to its locally predesignated party. The end user can ask the DSL provider to redirect its dedicated link to a different Internet service provider, but the end user cannot simply “dial up” any Internet service provider (or any other DSL end user) at will, as

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<sup>11/</sup> See also *MCI Communications Corp.*, 708 F.2d at 1093 n.8 (local telephone exchange service “enables the calling party to dial any telephone connected to the switched network within that exchange area”); *BellSouth Order*, 13 FCC Rcd at 20622 (wireless PCS meets definition because users can call and receive calls from every customer on wireless or wireline network).

<sup>12/</sup> See, e.g., *Offshore Tel. Co.*, 3 FCC Rcd at 4142 (oil rig radio service that simply links rig callers to mainland PSTN is not “telephone exchange service” where carrier provides no switching of its own that would allow rig callers to connect to each other directly); *Cox Cable Communications, Inc.*, 102 F.C.C.2d 110, 122 n.37 (1985), *vacated as moot*, 1 FCC Rcd 561 (1986) (data services provided over cable television network are not “telephone exchange service” even though there is limited switching, because “cable subscribers cannot ‘call’ every other subscriber connected to the switch; subscribers can only communicate with predesignated locations”).

<sup>13/</sup> See *Bell Atlantic Tel. Cos.*, 13 FCC Rcd 23667, 23668 (1998) (recognizing that DSL connections are “dedicated”); *GTE ADSL Order* at 22466-67 (same).

would be possible with a true, intercommunicating “telephone exchange service” under 47 U.S.C. § 153(47)(A).<sup>14/</sup> In other words, DSL services generally interconnect at a single point within the local exchange, and permit the customer to communicate with the World Wide Web *only* through this single point.

Finally, in order to qualify as a “telephone exchange service” under subsection (A), the statute also requires that a service be “covered by the exchange service charge” — that is, the basic local calling charge. 47 U.S.C. § 153(47)(A). DSL is not included in the price of basic local telephone service. *See, e.g., U S WEST, MegaBit Services — Pricing* (last modified May 14, 1999) <<http://www.uswest.com/products/data/dsl/pricing.html>> (“The pricing of MegaBit Services [U S WEST’s DSL offering] does not include pricing of phone service.”). Nor is DSL a substitute for local telephone service, such that the DSL price could be a *de facto* basic exchange service charge.<sup>15/</sup> Customers who purchase U S WEST’s DSL connections for their data traffic must continue to buy basic local voice telephone service and pay separate charges. *See id.* (“The [DSL] customer’s phone service remains the same and the customer continues to

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<sup>14/</sup> The *Advanced Services Order* notes that “there is no technical barrier to any end-user establishing a connection with any customer located on [the DSL provider’s packet-switched] network,” but this is beside the point. 13 FCC Rcd at 24033 (¶ 42). The end user may do this only by contacting the DSL provider, designating the other customer, and having the DSL provider set up a new dedicated data pipe to that other customer. The end user cannot set up and take down DSL connections to these other customers at will, as he can by dialing an ordinary telephone call.

<sup>15/</sup> Whatever the possibility of sending voice traffic through the public Internet as data via a DSL connection, the DSL services that U S WEST described in its petition for a declaratory ruling (and for which it sought regulatory clarification) were data-only services, not substitutes for traditional voice service. *See Reply Comments* at 36-37 (J.A. \_\_\_\_ - \_\_\_\_). A subscriber to one of these services would separately obtain ordinary voice service at the usual exchange service charge.

pay the current charges for residential or business phone service.”); *GTE ADSL Order*, 13 FCC Rcd at 22471-22472 (noting that, with DSL, “an end user will still need to purchase standard residential or basic service”).

**2. Digital subscriber line services are not “comparable” to traditional telephone exchange service.**

The 1996 Act added the second part of the definition of “telephone exchange service,” clarifying that the term includes “*comparable* service provided through a system of switches, transmission equipment, or other facilities.” 47 U.S.C. § 153(47)(B) (emphasis added). Although there is no legislative history explaining this amendment to the prior statutory definition, it presumably reflects an understanding that network technologies might change over time, and that the traditional local telephone services described in the old definition might eventually be provided over different facilities and networks than the ones originally described.

The *Advanced Services Order* takes this amendment as a license to remove all limits on the class of regulated services. In its comments to the FCC, U S WEST argued that, by using the word “comparable,” Congress meant to include those services that are functionally similar to and can substitute for the switched local services long held to satisfy the original statutory definition. *Petition for Relief* at 45-46 n.24 (J.A. \_\_\_\_ - \_\_\_\_); *Reply Comments* at 19-20 (J.A. \_\_\_\_ - \_\_\_\_); *Comments on ALTS Petition* at 15-17 (J.A. \_\_\_\_ - \_\_\_\_). In the *Order*, however, the FCC ignored this argument and instead set up and rejected a straw man. The FCC ruled that the amendment “refutes any attempt to tie these statutory definitions to a particular technology” — even though U S WEST had never suggested that *technological* identity was the standard of comparability. *Advanced Services Order*, 13 FCC Rcd at 24032 (¶ 41). The *Advanced Services*

*Order* does not propose any alternative definition of “comparable.” Nor does it articulate any principle that might limit the class of services that could be regulated as “telephone exchange service.”<sup>16/</sup>

The Court should reject the FCC’s attempt to deny content to the definition of “telephone exchange service.” While Congress’s amendment arguably expanded the range of services that count as “telephone exchange service,” it plainly did not remove all limits on the term. On the contrary, it only broadened the definition to include those services that are “comparable” to those described in the preexisting language — again, two-way, any-to-any, switched local services. 47 U.S.C. § 153(47)(B).

“Comparable” here has its ordinary meaning of “equivalent” or “similar”; “comparable” services have “enough like characteristics or qualities to make comparison appropriate.” *Webster’s Third New Int’l Dictionary* 461 (1971). Service is “comparable” to traditional telephone exchange service if it is the functional “equivalent” of such service, or sufficiently “similar” to be a substitute. Indeed, this was how the FCC *itself* interpreted “comparability” under this same provision prior to the *Advanced Services Order*: The FCC ruled, for example, that cellular and other wireless services are “comparable” because wireless carriers “provide local, two-way switched voice service as a principal part of their business,” and these wireless services could “become a true economic substitute for wireline local exchange

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<sup>16/</sup> While the FCC recited a bare technical description of how DSL services are configured, see *Advanced Services Order*, 13 FCC Rcd at 24033 (¶ 42), it never explained what about this technical configuration makes DSL service “comparable”; it simply said that it “[saw] nothing in this service architecture mandating a conclusion that advanced services . . . fall outside” of the statutory definition. *Id.* The FCC “omitted the critical step — connecting the facts to the conclusion.” See *Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995).

service.” *Implementation of the Local Competition Provisions in the Telecommunications Act*, 11 FCC Rcd 15499, 15999-16000 (1996).<sup>17/</sup> See also *Federal-State Joint Bd. on Universal Svc.*, 13 FCC Rcd 11501, 11528 (1998) (describing comparability in terms of providing the same services over alternative facilities, such as substitutes for the copper loop).

In the order under review, however, the FCC denied that it was required to find that DSL services are equivalent to or substitutes for traditional telephone exchange service. See *Advanced Services Order*, 13 FCC Rcd at 24032 (¶ 41). It could not have made this finding in any case. U S WEST’s DSL services are not a market substitute for ordinary two-way switched local calling. They are high-speed data services that are marketed as a supplement to, not a substitute for, basic local service; a customer who purchases DSL service must still buy basic local telephone service separately to make and receive local calls. Moreover, DSL services are not functionally equivalent to traditional local calling: Rather than offering freely switched connections among all the subscribers within a limited local calling area, DSL provides only a dedicated connection to a predesignated local recipient. See *GTE ADSL Order*, 13 FCC Rcd at 22472.

Notably, since issuing the *Advanced Services Order*, the FCC has ruled that these very same characteristics will *disqualify* a service from the expanded definition of “telephone exchange service.” The FCC has ruled that even typical dial-up Internet access, where the end

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<sup>17/</sup> The FCC denies that it ever “suggested that two-way voice service is a *necessary* component of telephone exchange service.” *Advanced Services Order*, 13 FCC Rcd at 24033 (¶ 42) (emphasis in original). But it never suggested any criterion *other* than this one to determine whether something is telephone exchange service. It certainly articulated no such criterion in the *Advanced Services Order*.

user makes an ordinary circuit-switched telephone call over the PSTN to an Internet service provider's local number, is not "telephone exchange service" because the communication is not local: As with a DSL transmission, the FCC deems an Internet-bound dial-up call to terminate not at the Internet service provider, but at the various web servers located outside the local calling area. See Declaratory Ruling, *Inter-Carrier Compensation for ISP Bound Traffic*, CC Dkt. No. 96-98, FCC 99-38, ¶¶ 12, 16-17 (rel. Feb. 25, 1999). Similarly, the FCC has recently ruled that "special access" — defined as "a dedicated path between an end user and an interexchange carrier's point of presence" — is not "telephone exchange service" because it does not involve any-to-any intercommunication among all local subscribers. In so ruling, the FCC cited DSL as the paradigm of a "special access" service. See Mem. Op. and Order, *Applications for Consent to the Transfer of Control of Licenses from Tele-Communications, Inc. to AT&T Corp.*, CS Dkt. No. 98-178, FCC 99-24, ¶ 135 & n.384 (rel. Feb. 17, 1999) (citing *GTE ADSL Order*, 13 FCC Rcd at 22480). (As explained in the next section, calling DSL a "special access" service does not mean that DSL is "exchange access" — the second service that defines a LEC. "Special" access simply means that the connection is dedicated rather than switched. See *GTE ADSL Order*, 13 FCC Rcd at 22480; *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1005 (D.C. Cir. 1996) (describing difference between "special" and "switched" access.)) These later holdings confirm that, if the FCC had actually *tried* to apply the statute to determine whether U S WEST's DSL services are "comparable" to traditional telephone exchange service, it would have been required to agree with U S WEST that they are not.

**B. Digital Subscriber Line Services Do Not Constitute “Exchange Access.”**

In the decision under review, the FCC merely recited Congress’s definition of “exchange access,” then promptly ignored it. *See Advanced Services Order*, 13 FCC Rcd at 24032-33 n.71 (¶ 41 n.71). Here, too, if the agency *had* tried to apply the definition, it would have had to acknowledge that DSL services do not fall within its terms. DSL does not involve the use of telephone exchange facilities to originate and terminate long-distance “toll” telephone calls, the *sine qua non* of “exchange access.”

“Access services” refer generically to “services and facilities provided for the origination and termination of any interstate or foreign telecommunication.” 47 C.F.R. § 69.2(b). *See also Southwestern Bell Tel. Co.*, 100 F.3d at 1005 (describing access services generally). There are two different subcategories of “access services.” The Act’s definition of a “local exchange carrier” applies only to an entity that provides “*exchange access*,” defined as “the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of *telephone toll services*.” 47 U.S.C. § 153(16) (emphasis added). The other subcategory of “access service” is “*information access*,” defined since before the Act as “the provision of specialized exchange telecommunications . . . in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services.” *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982) (AT&T divestiture decree). The 1996 Act preserves the distinction between “exchange” and “information” access, *see, e.g.*, 47 U.S.C. § 251(g) (distinguishing between “exchange access, information access, and exchange services”),



and the FCC has acknowledged that these remain distinct services under the Act. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 22023-24 n. 621 (1996) (hereinafter “*Non-Accounting Safeguards Order*”); *Access Charge Reform*, 12 FCC Rcd 15982, 16134-35 (1997).

DSL is not used to originate or terminate “telephone toll services,” as is required of “exchange access.” 47 U.S.C. § 153(16).<sup>18/</sup> The 1996 Act defines “telephone toll service” as “telephone service between stations in different exchange areas” — in other words, ordinary telephone-to-telephone long-distance calling. 47 U.S.C. § 153(48). (A “station” is simply another word for a telephone. *See* Harry Newton, *Newton’s Telecom Dictionary* 744 (15th ed. 1999).) DSL service does not connect one telephone user to another for the purpose of making a long-distance toll call; therefore, it is not “*exchange access*.”

DSL is, instead, a form of “*information access*” — a service giving end users high-speed data access from their computers to Internet service providers and other providers of

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<sup>18/</sup> Congress’s limitation of “exchange access” to “telephone toll service” links is significant. Before the 1996 Act, the AT&T divestiture decree defined “exchange access” more broadly as “the provision of exchange services for the purpose of originating or terminating *interexchange telecommunications*” generically. *American Tel. & Tel. Co.*, 552 F. Supp. at 228. Congress’s conscious decision to narrow the scope of the term in the 1996 Act must be given meaning.

information services.<sup>19/</sup> FCC decisions make this clear. In its *Non-Accounting Safeguards Order*, the FCC reaffirmed that the data services offered by Internet service providers cannot be “telephone toll services” because these companies provide “information services” rather than basic “telecommunications.” 11 FCC Rcd at 22023-24.<sup>20/</sup> For that reason, it further held, the access links that allow subscribers to reach information service providers cannot be considered “exchange access.” *Id.* The FCC held that information service providers instead purchase “information access,” which, it acknowledged, is a wholly distinct category under the Act. *Id.* n.621. The FCC has reinforced this holding in other decisions confirming that Internet service providers are not required to pay the access charges normally paid by purchasers of exchange access.<sup>21/</sup>

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<sup>19/</sup> As noted above, in the *GTE ADSL Order*, the FCC ruled that DSL is a “special access service.” *GTE ADSL Order*, 13 FCC Rcd at 22480. This simply means that the access link is dedicated rather than switched. *Id.* See also *Southwestern Bell Tel. Co. v. FCC*, 100 F.3d 1004, 1005 (D.C. Cir. 1996) (describing difference between “special” and “switched” access). Special access can be either information or exchange access, depending on whether the access link is used to originate telephone toll service or information services. Because DSL provides end users with a dedicated data link to a provider of information services (such as an Internet service provider), it constitutes a special information access service.

<sup>20/</sup> The Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, *without change in the form or content of the information as sent and received.*” 47 U.S.C. § 153(43) (emphasis added). Internet service providers are not passive conduits of data. Instead, they provide “information service,” defined in the Act as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” *Id.* § 153(20). See *Federal-State Joint Bd. on Universal Svc.*, 13 FCC Rcd 11501, 11540 (1998) (ruling that Internet service providers offer “information services,” not “telecommunications”).

<sup>21/</sup> See, e.g., *id.*; *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997) (noting that Internet service providers do not use the PSTN the same way that long-distance carriers and other purchasers of “exchange access” do).

The FCC did not acknowledge these precedents in the *Advanced Services Order*, let alone distinguish them. Indeed, the FCC gave no explanation at all of how DSL services could constitute “exchange access,” just as it did not explain why they might meet the old or expanded definitions of “telephone exchange service.” Tracing through Congress’s language and agency precedent makes it abundantly clear that DSL is *neither* of the two kinds of service listed in Congress’s definition of a “local exchange carrier,” 47 U.S.C. § 153(26); rather, it falls in the entirely different statutory category of information access.

## **II. THE *ADVANCED SERVICES ORDER* FALLS SHORT OF THE REASONED DECISIONMAKING REQUIRED OF ADMINISTRATIVE AGENCIES.**

The five paragraphs of the *Advanced Services Order* purporting to address U S WEST’s statutory arguments are hardly a model of administrative clarity or rationality. As noted above, in rejecting those arguments, the FCC never articulates any view of what it believes “telephone exchange service” or “exchange access” to mean, even though it concedes that a carrier’s regulatory obligations “turn on whether the carrier is providing” one or the other of these services. *Advanced Services Order*, 13 FCC Rcd at 24031 (¶ 38). With respect to “telephone exchange service,” the FCC takes the mere fact of the addition of the “comparability” test as license to read the definition’s limitations out of the Act. *Id.* at 24032-33 (¶ 41). And with respect to “exchange access,” the FCC says nothing at all. What is more, the FCC refuses even to say *which* of the two statutory categories might apply to DSL services, *id.* at 24032 (¶ 40), and other recent orders strongly indicate that DSL does not fall into *either* category. At

its core, the *Advanced Services Order* simply says, “I know it when I see it, and I’ll regulate it when I do.”

At a minimum, the Court should vacate the *Advanced Services Order* and remand it to the FCC for a reasoned consideration of U S WEST’s arguments and explanation of its ruling. The FCC is entitled to no deference in this regard. “Judicial deference to decisions of administrative agencies . . . rests on the fundamental premise that agencies engage in reasoned decision-making.” *American Lung Ass’n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998). *See also A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) (“Deferring to an agency’s exercise of its discretion . . . is not tantamount to abdicating the judiciary’s responsibility under the Administrative Procedure Act to set aside agency actions that are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”). The *Advanced Services Order* fails that test.

**A. To the Extent the FCC Offers Any Reasoning, Its Explanations Are Entirely Inadequate.**

To find that DSL services constitute either “telephone exchange service” or “exchange access” within the meaning of the 1996 Act, the FCC had to find one of three things: (1) DSL services meet the pre-Act definition of “telephone exchange service,” (2) DSL services are “comparable” to the services that meet the pre-Act definition, or (3) DSL services fall within the statutory definition of “exchange access,” meaning that they are used for “telephone toll services.” The *Advanced Services Order* says not a word about the first and third propositions. With respect to the second, the FCC rejects U S WEST’s reading of “comparable services” — that they must be functionally equivalent to or substitutes for services long held to satisfy the old

definition — on the basis of a straw man. The FCC's *only* explanation is that the "language of the statute . . . refutes any attempt to tie these statutory definitions to a particular technology." *Advanced Services Order*, 13 FCC Rcd at 24032-33 (¶ 41). But that is an argument U S WEST never made; on the contrary, U S WEST took technological evolution as a given, and suggested that comparability be defined in terms of functional or marketplace similarity. *Petition for Relief* at 45-46 n.24 (J.A. \_\_\_\_-\_\_); *Reply Comments* at 19-20 (J.A. \_\_\_\_-\_\_); *Comments on ALTS Petition* at 16-17 (J.A. \_\_\_\_-\_\_).

In any event, the *Advanced Services Order* offers no definition of "comparable" that could justify equating non-local, non-any-to-any DSL services with traditional local telephone exchange service. The *Order* thus contains no explanation at all as to why the FCC may extend local exchange regulation to DSL services. At the end of the day, the FCC seeks to regulate because it sees no reason not to: The agency "see[s] nothing . . . mandating a conclusion that advanced services offered by incumbent LECs fall outside of the 'telephone exchange service' or 'exchange access' definitions set forth in the Act." *Advanced Services Order*, 13 FCC Rcd at 24033 (¶ 42) (emphasis added).

This utter lack of justification — and tacit suggestion that none is necessary — cannot stand. "[A]n agency must cogently explain why it has exercised its discretion in a given manner,' . . . and that explanation must be 'sufficient to enable [a court] to conclude that the [agency's action] was the product of reasoned decisionmaking.'" *A.L. Pharma, Inc.*, 62 F.3d at 1491 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 28, 48, 52 (1983)). See also *American Lung Ass'n*, 134 F.3d at 392 ("[I]t will not do for a court to be compelled to guess at the theory underlying the agency's action.""). It is not enough for an

agency simply to recite a party's arguments, then issue "ipse dixit conclusion[s]" saying nothing more than "We disagree." *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997). See also *Building & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 277 (D.C. Cir. 1992) ("To state a conclusion is not to reason."). The FCC's failure to articulate its reasons for regulating justifies a vacation and remand of the *Advanced Services Order*.

**B. The FCC's Failure To Define the Categories of Service Subject to Regulation — or Even To Say Which Category Applies Here — Is the Essence of Arbitrary and Capricious Agency Action.**

By refusing to explain the criteria by which it will consider a service to be "telephone exchange service" or "exchange access" (and therefore subject to the obligations of sections 251(b) and (c)), the FCC leaves telecommunications carriers with no guidance as to when deploying a new service will subject them to local exchange carrier regulation. In the wake of the *Advanced Services Order*, carriers must simply assume that the FCC might try to regulate *any* future telecommunications service they provide, and adjust their investment and deployment decisions accordingly. (The FCC's *statutory* errors in this case only reinforce this assumption.) Moreover, an order such as this one permits the FCC to make itself unaccountable: A decision that contains no reasoning cannot be tested for consistency with prior rulings and cannot become precedent that constrains the agency in the future.

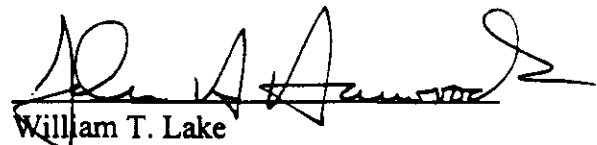
Such "ad hocery . . . is the core concern underlying the prohibition of arbitrary or capricious agency action." *Pacific Northwest Newspaper Guild, Local 82 v. NLRB*, 877 F.2d 998, 1003 (D.C. Cir. 1989) (quotation marks omitted). It also violates "[e]lementary administrative law norms of fair notice." *Checkosky v. SEC*, 139 F.3d 221, 224 (D.C. Cir. 1998).

The Court has made clear that it “simply will not do for a government agency to declare — without explanation — that a proposed course of private action is not approved. To refuse to define the criteria it is applying is equivalent to simply saying no without explanation.” *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (citation omitted). An agency may never regulate simply by saying, “I know it when I see it.” *Id.* Cf. *Checkosky*, 139 F.3d at 225 (rejecting agency interpretation that effectively permits it “a self-proclaimed license to charge and prove improper professional conduct whenever it pleases, constrained only by its own discretion”). To be sure, an agency may resolve issues incrementally through case-by-case proceedings rather than by general regulation, “but it must be possible for the regulated class to perceive the principles which are guiding agency action” in the individual cases. *Pearson*, 164 F.3d at 661. It is impossible for carriers to derive any such principles from the *Advanced Services Order* because the FCC went out of its way to avoid articulating any.

**CONCLUSION**

For the foregoing reasons, the *Advanced Services Order* should be vacated and remanded to the FCC.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'William T. Lake', is written over a horizontal line.

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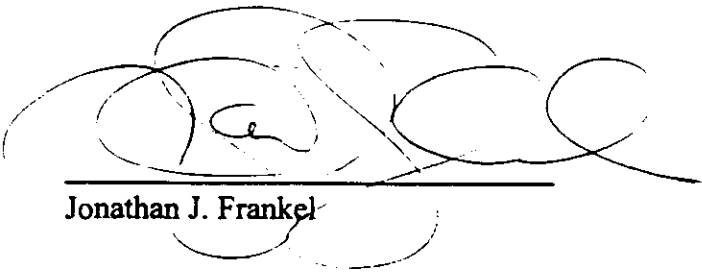
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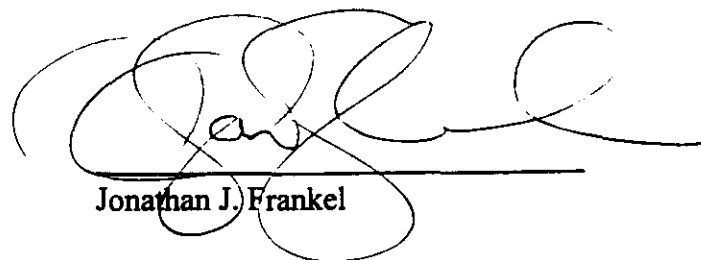
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## **Addendum A: Relevant Statutory Provisions**

## **RELEVANT STATUTORY PROVISIONS**

### **47 U.S.C. § 153**

#### **§ 153(16) Exchange access**

The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

\* \* \*

#### **§ 153(26) Local exchange carrier**

The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.

\* \* \*

#### **§ 153(47) Telephone exchange service**

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

\* \* \*

#### **§ 153(48) Telephone toll service**

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

**Addendum B: Excerpt from the**  
***Advanced Services Order***



Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	
Petition of Bell Atlantic Corporation	)	CC Docket No. 98-11
For Relief from Barriers to Deployment of	)	
Advanced Telecommunications Services	)	
	)	
Petition of U S WEST Communications, Inc.	)	CC Docket No. 98-26
For Relief from Barriers to Deployment of	)	
Advanced Telecommunications Services	)	
	)	
Petition of Ameritech Corporation to	)	CC Docket No. 98-32
Remove Barriers to Investment in	)	
Advanced Telecommunications Technology	)	
	)	
Petition of the Alliance for Public	)	CCB/CPD No. 98-15
Technology Requesting Issuance of Notice	)	RM 9244
of Inquiry and Notice of Proposed	)	
Rulemaking to Implement Section 706 of	)	
the 1996 Telecommunications Act	)	
	)	
Petition of the Association for Local	)	CC Docket No. 98-78
Telecommunications Services (ALTS) for a	)	
Declaratory Ruling Establishing Conditions	)	
Necessary to Promote Deployment of	)	
Advanced Telecommunications Capability	)	
Under Section 706 of the Telecommunications	)	
Act of 1996	)	
	)	
Southwestern Bell Telephone Company,	)	CC Docket No. 98-91
Pacific Bell, and Nevada Bell Petition for	)	
Relief from Regulation Pursuant to Section	)	
706 of the Telecommunications Act of 1996	)	
and 47 U.S.C. § 160 for ADSL Infrastructure	)	
and Service	)	

**MEMORANDUM OPINION AND ORDER, AND  
NOTICE OF PROPOSED RULEMAKING****Adopted: August 6, 1998****Released: August 7, 1998****Comment Date: September 21, 1998****Reply Comment Date: October 13, 1998**

By the Commission: Commissioners Ness, Powell and Tristani issuing separate statements.

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**b. Telephone Exchange Service or Exchange Access**

**(1) Background**

38. Certain obligations under section 251 turn on whether the carrier is providing "telephone exchange service" or "exchange access."<sup>63</sup> Pursuant to section 251(c)(2), an incumbent LEC must provide interconnection only "for the transmission and routing of telephone exchange service and exchange access."<sup>64</sup> Section 251(b) applies to each "local exchange carrier"; section 153(26), in turn, defines "local exchange carrier" to include any person "engaged in the provision of telephone exchange service or exchange access."<sup>65</sup>

39. Prior to 1996, the Communications Act defined "telephone exchange service" to include "service within a telephone exchange, or within a connected system of telephone

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<sup>61</sup> We also note that GTE is subject to ONA. *See Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation*, 9 FCC Rcd 4922, 4924, 4932-36, ¶¶ 3, 16-24 (1994).

<sup>62</sup> *See infra* ¶ 49.

<sup>63</sup> The Act defines "telephone exchange service" as:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § 153(47). The Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16). "Telephone toll service" means "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48).

<sup>64</sup> 47 U.S.C. § 251(c)(2).

<sup>65</sup> 47 U.S.C. §§ 251(b), 153(26).

exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange and which is covered by the exchange service charge."<sup>66</sup> In the 1996 Act, Congress expanded that definition to include "comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."<sup>67</sup> The Act defines "exchange access" to mean "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."<sup>68</sup>

## (2) Discussion

40. We conclude that advanced services offered by incumbent LECs are either "telephone exchange service" or "exchange access." At this time, we do not decide whether, or to what extent, specific xDSL-based services offered by incumbent LECs are "telephone exchange service" as opposed to "exchange access." We note, however, that this question has been raised in other pending proceedings, and we will continue to address it on a case-by-case basis.<sup>69</sup>

41. Nothing in the statutory language or legislative history limits these terms to the provision of voice, or conventional circuit-switched service. Indeed, Congress in the 1996 Act expanded the scope of the "telephone exchange service" definition to include, for the first time, "comparable service" provided by a telecommunications carrier.<sup>70</sup> The plain language of the statute thus refutes any attempt to tie these statutory definitions to a particular technology.<sup>71</sup> Consequently, we reject U S WEST's contention that those terms refer only to

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<sup>66</sup> This language is now 47 U.S.C. § 153(47)(A).

<sup>67</sup> 47 U.S.C. § 153(47)(B).

<sup>68</sup> 47 U.S.C. § 153(16).

<sup>69</sup> See, e.g., *GTE Telephone Operations, GTOC Tariff No. 1, GTOC Transmittal No. 1148 (GTE DSL Solutions – ADSL Service)*, CCB/CPD 98-79 (set for investigation May 28, 1998); *SBC Communications, Inc., Pacific Bell Telephone Company, Pacific Transmittal No. 1986*, CC Docket No. 98-103 (set for investigation June 28, 1998).

<sup>70</sup> 47 U.S.C. § 153(47)(B). This amendment in turn has modified the scope of "exchange access," which the Act defines as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16) (emphasis added).

<sup>71</sup> See Comments of Senators Stevens and Burns, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (Report to Congress) (filed Jan. 26, 1998), at 2, n.1:

[The 1996 amendment] would not have been necessary had Congress intended to limit telephone exchange service to traditional voice telephony. The new definition was intended to ensure that the definition of local exchange carrier, which hinges in large part on the definition

local circuit-switched voice telephone service or close substitutes, and the provision of access to such services.<sup>72</sup>

42. We note that in a typical xDSL service architecture, the incumbent LEC uses a DSLAM to direct the end-user's data traffic into a packet-switched network, and across that packet-switched network to a terminating point selected by the end-user. Every end-user's traffic is routed onto the same packet-switched network, and there is no technical barrier to any end-user establishing a connection with any customer located on that network (or, indeed, on any network connected to that network).<sup>73</sup> We see nothing in this service architecture mandating a conclusion that advanced services offered by incumbent LECs fall outside of the "telephone exchange service" or "exchange access" definitions set forth in the Act.

43. U S WEST's reliance on the fact that the Commission in the *Local Competition Order* noted that CMRS carriers "provide local, two-way switched voice service," as part of the analysis leading to its conclusion that such carriers provide telephone exchange service, is misplaced.<sup>74</sup> The Commission nowhere suggested that two-way voice service is a *necessary* component of telephone exchange service.<sup>75</sup> It certainly did not suggest that two-way voice service is a necessary component of exchange access.

44. We also reject U S WEST's contention that it is not subject to section 251(c) for its provision of advanced services because such services are neither "telephone exchange services" nor "exchange access services."<sup>76</sup> To the extent that it offers advanced services, U S

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of telephone exchange service, was not made useless by the replacement of circuit switched technology with other means -- for example packet switches or computer intranets -- of communicating information within a local area.

<sup>72</sup> See U S WEST Comments (CC Docket No. 98-78) at 15-17; see also U S WEST Reply Comments (CC Docket No. 98-26) at 19-20; see also NTIA July 17 *Ex Parte* at 7, n.22 ("neither [section 251(c)] nor its legislative history suggests that its requirements apply only to an ILECs' circuit-switched facilities and services").

<sup>73</sup> Subscribers typically set up what are termed "permanent virtual connections" in routing their traffic across a packet-switched network. Such a connection, which gives the end user an "always-on" connection over a preset physical path, is easier to provision than a "switched virtual circuit," in which the connection path is determined on a call-by-call basis. A "permanent virtual connection," however, is not so "permanent" as the term would suggest. Any subscriber located on a packet-switched network can request the establishment of a permanent virtual connection connecting its own computers with those of any other subscriber. Indeed, it appears that customers can easily create and tear down different permanent virtual connections to different destinations on the network, giving them a degree of "switched" functionality.

<sup>74</sup> See U S WEST Comments (CC Docket No. 98-78) at 16 & n.16.

<sup>75</sup> See *Local Competition Order*, 11 FCC Rcd at 15999, ¶ 1013.

<sup>76</sup> See U S WEST Petition at 45, n.24; U S WEST Comments (CC Docket Nos. 98-11, 98-32) at 7; U S WEST Reply Comments (CC Docket No. 98-26) at 18-20.

WEST contends, it is not acting as a "local exchange carrier" or "incumbent local exchange carrier," and the obligations imposed by section 251(c) on incumbent local exchange carriers do not apply. Because we have determined that advanced services offered by incumbent LECs are telephone exchange service or exchange access, we need not and do not address the section 251(c) obligations of an incumbent local exchange carrier offering services other than telephone exchange service or exchange access.<sup>77</sup>

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<sup>77</sup> See *supra* ¶¶ 40-43.